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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

FBK REALTY CORP.,

Petitioner,

against

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Brief *Amicus Curiae* of the Community Housing Improvement Program, Inc., in Support of Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

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Statute Involved

Section 96-109 of the Zoning Resolution of the City of New York provides:

> Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a *building* containing *residential uses* within the Preservation Area, the Administrator of Housing and Development shall certify to the Department of Buildings:
>
> (a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the Administrator of Housing and Development of his intention to alter the *building;*

(b) That the eviction and relocation practices followed by the owner of the *building* satisfy all applicable legal requirements and that no harassment has occurred.

(Italics in original as denoting terms defined elsewhere in Zoning Resolution.)

Interest of the Community Housing Improvement Program, Inc.

The Community Housing Improvement Program, Inc. ("CHIP") is a not-for-profit trade association representing 2,500 owners of regulated apartment buildings in the City of New York, including many in the Special Clinton District.

CHIP's primary objective as an organization is the preservation of privately-owned rental housing. CHIP's concern in the Special Clinton District is that Zoning Resolution 96-109 has precluded private investors from providing new or rehabilitated housing in the area.

It will be our purpose, in this brief, to show that the petition for a writ of certiorari brought by FBK Realty Corp. should be granted because Zoning Resolution 96-109 works to effect a taking of property without compensation. We will show that the Zoning Resolution does not serve a legitimate public benefit because it effectively prohibits rehabilitation of buildings in the Special Clinton District. We also demonstrate that as a result of the Zoning Resolution, FBK cannot reasonably use its property nor receive a reasonable return on same.

Summary of Argument

Zoning Resolution Section 96-109 (the "Resolution") is unconstitutional because it works to take an owner's property without due compensation. The Resolution prohibits an owner from obtaining an alteration permit unless the Department of Housing Preservation and Development ("HPD") first issues a Certificate of No Harassment. HPD defines "owner" as any individual or entity in the chain of title.

Therefore, the acts of any predecessor-in-interest will be binding on the present owner. This is true even if the present owner did not harass and even if the present owner had no actual or constructive knowledge of the acts of its predecessor(s). As a result, the owner is left without any legal ability to improve a building or even to restore essential building systems.

The Resolution provides no legitimate public benefit. The building involved herein is representative of the many buildings in the area commonly known as "Hell's Kitchen." It was constructed around the turn of the century. Immediate repair and improvement is necessary.

FBK Realty Corp. ("FBK") has stated its good faith intention to repair and improve the property for the benefit of the present as well as prospective tenants. However, because of the Resolution, FBK cannot obtain an alteration permit. The building continues to deteriorate.

The Resolution's obstensible aim is to retain the character of the neighborhood and to preserve the mixed-income nature of the residents of Hell's Kitchen. This aim cannot be realized; operation of the Resolution mandates that the zoning district retain the character of a foul and decaying slum. Such result, we submit, is arbitrary and unconstitutional.

This is especially so because FBK's building must remain subject to residential use. FBK cannot convert the property to commercial use or even raze the building and sell the vacant land. Instead, the draconian impact of the Resolution requires that the building continue to deteriorate. Under these circumstances, FBK has been denied a reasonable use and return on its property.

ARGUMENT

This Court should grant FBK's petition for a writ of certiorari and should determine whether Zoning Resolution Section 96-109 is unconstitutional because it effects a taking of property without due compensation.

There is no precise rule which determines when property has been "taken" in a constitutional sense. See, *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Because no rigid rules can be laid down to distinguish compensible losses from non-compensible losses under the Fifth Amendment,* each case must be judged on its own facts. See, *United States v. Caltex (Phillipines), Inc.,* 344 U.S. 149 (1952), *reh. den.* 344 U.S. 919 (1953); *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958), *reh. den.* 358 U.S. 858 (1958). Such a factual inquiry calls, "as much for the exercise of judgment as for the application of logic." *Andrus v. Allard,* 444 U.S. 51, 65 (1979).

The inquiry also involves a weighing of public and private interests. See, *Agins v. City of Tiburon,* 447 U.S. 255, 260-261 (1980). When, as here, the application of a general zoning ordinance as applied to a particular property does not substantially advance legitimate state interests, a taking has occurred. See, *Nectow v. Cambridge,* 277 U.S. 183, 188 (1928). So too, a taking is present when application of the ordinance denies an owner economically viable use of his land. See, *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 138, n. 36 (1978). As we show, the Resolution does not substantially advance a legitimate state interest but rather insures that the Clinton District will remain subject to ruin and decay thus rendering a parcel of property located in the District virtually worthless.

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* The Fifth Amendment to the United States Constitution provides in pertinent part: . . . nor shall private property be taken for public use, without just compensation. This prohibition is made applicable to the states pursuant to the Fourteenth Amendment. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), *reh. den.* 58 L.Ed.2d 198 (1978).

A. No legitimate state interest is advanced when the resolution forecloses an owner from upgrading a decaying building in the Clinton District thereby insuring that the building will be subject to further deterioration.

As FBK's petition for a writ of certiorari shows, HPD interprets the Resolution to provide that a Certificate of No Harassment (a prerequisite to obtaining an alteration permit) must be denied when any predecessor of the present fee owner has committed an act of harassment. Thus, the present, or any future, fee owner cannot improve the property. Nor can the owner upgrade essential systems for the benefit of the present residential tenants.

At the harassment hearing, HPD was apprised that because the subject building was constructed around the turn of the century, many essential systems were in a ruined state and in need of replacement. FBK's architect noted that the present DC electrical system looked like it has been "chewed on" (20-21a). The rusted plumbing system was beyond repair. Indeed, because the plumbing joists had been put together with old solder, they could not be resoldered without decomposing the pipes. Repair of these systems, as well as replacement of the boiler system* requires the issuance of an alteration permit. Yet due to HPD's harassment finding (even if attributable to prior owners in the chain), FBK cannot obtain an alteration permit so long as the Resolution is in effect.

HPD's answer to FBK's Article 78 Petition sets forth their interpretation of the ameliorative purpose underlying the Resolution, to wit:

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* The self-defeating nature of the Resolution is amply underscored by the boiler incident. FBK was alleged to harass due to a lack of heat and hot water. A new boiler would abate this condition. But an alteration permit is necessary to install a new boiler and none would issue because of the harassment finding. Nevertheless, FBK improved the building (and the habitability of the two tenants in the building) by replacing the boiler. Incongruously, however, FBK was cited for a Building Code violation, to wit: an illegal installation made without an alteration permit (FBK Petition at p. 6).

> *The regulations applicable to the Special Clinton District are designed to preserve and strengthen the low-rise residential character of the district.* They are also intended to maintain a mixture of income groups which were found to reside in the Clinton area at the time of adoption of the Special Clinton District (Paragraph 31, 37a) (emphasis supplied).

HPD's answer also provides that, "upgrading" (*i.e.*, alteration) of buildings which does violence to the socio-economic composition of the area's population is inconsistent with the goals of the district (62a).

We submit that this reasoning cannot withstand constitutional scrutiny. An already tenuous building need not be subject to further and needless deterioration. However, this is HPD's position. HPD's answer at paragraph 93 states in pertinent part:

> *. . . the subject premises may be maintained in the same manner that it has been occupied for many years, and comparable to the use to which hundreds of similar residential buildings in Clinton and throughout the City of New York are presently being put* (62a) (emphasis supplied).

It is hard to imagine any public benefit gained by allowing an already run-down building to deteriorate. The tenants in the subject building would benefit from repair and improvement. Indeed, at the hearing before HPD, FBK's president, Mr. Hefelfinger stated on the record that the tenants could remain in the building as long as they wished and the work would be performed in such a manner which would not require them to vacate (Petition at pp. 6-7).

Notwithstanding, FBK's good faith intentions, its building, as well as others in the Clinton District where a finding of harassment has been found, can never be improved.

A noted commentator in the area of zoning has observed in language which applies with particular force herein:

> Zoning ordinances enacted to achieve even a laudable objective will be disapproved when they impose restrictions so narrow as to prevent reasonable development of the land to which they apply. Anderson, *American Law of Zoning,* 2nd Ed., Section 3.26, p. 152.

We submit that the permanent nature of the prohibition imposed by the Regulation exacerbates and does not ameliorate the conditions it was enacted to abate. As such, the Resolution is not only unreasonable, but more importantly, it is unconstitutional. FBK's petition for a writ of certiorari should therefore be granted.

B. The Resolution denies FBK reasonable use and a reasonable return on its property.

In this case, FBK argues that the Resolution, as interpreted by HPD, results in an unconstitutional taking. If any harassment has occurred in the past (regardless of whether such harassment was done by the present owner), a Certificate of No Harassment will be refused. Absent such certificate an alteration permit can never be obtained. FBK, or any future owner, is therefore left with a decaying property which, as a matter of law, can never be improved or even repaired to any extent for which an alteration permit is required. This absolute bar, existing in perpetuity, also renders the property without any viable resale value.

HPD argues that the Resolution does not operate to deny FBK either reasonable use or a reasonable return on its property. We submit that HPD is mistaken on both scores.

As now Chief Justice Rehnquist explained in his dissenting opinion in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 149-150 (1978):

> A taking does not become a noncompensible exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of its property. *"[I]t is the character of*

> *the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking". United States v. Cress,* 243 U.S. 316, 328, 61 L.Ed 746, 37 S. Ct. 380 (1917); *United States v. Causby,* 328 U.S., at 266, 9 L.Ed 1206, 66 S. Ct. 1062. See also *Goldblatt v. Hempstead,* 369 U.S. at 594, 8 L.Ed2d 130, 82 S. Ct. 987 (emphasis supplied).

We submit that the invasion of FBK's property rights is too onerous to pass constitutional muster.

In the context of the Fifth Amendment taking clause, the term "property" encompasses the entire group of rights inhering in a citizen's (ownership). *United States v. General Motors Corp.,* 323 U.S. 373, 378 (1945). "Property" thus, " . . . denote[s] the group of rights inherent in the citizen's relation to the physical things, as the *right to possess, use and dispose of it." "The constitutional provision is addressed to every sort of interest the citizen may possess." Id.* at 378 (emphasis supplied).

Plainly, neither FBK nor any present or future similarly situated owner will be able to make beneficial use of property in the Clinton District. A one-time finding of harassment, regardless of when and by whom it was caused, requires that a building be and remain subject to deterioration.

In this case, FBK's rent roll, consisting of two rent-controlled tenancies, is virtually non-existent. In stark contrast, FBK's tax obligations to the City of New York remain constant. Additionally, FBK remains obligated to keep the premises up to the standards set forth in the myriad of housing regulations for the City of New York. But compliance can never be fully achieved absent the issuance of an alteration permit. Taking the draconian impact of the Resolution to its logical extreme, the subject building may very well be abandoned and thus revert to the City of New York. This is an illogical result when considering that FBK seeks to improve the property.

HPD appears to ignore these practical realities arguing instead that the requirement that a permit be obtained cannot constitute a taking. This Court's decision in *United States v. Riverside Bayview Homes, Inc.*, ____ U.S. ____, 106 S. Ct. 455, 459 (1985), is instructive in this regard. Noting therein that a requirement that a permit be obtained for a certain use does not, standing alone, "take" the property, this Court went on to explain:

> . . . after all, the very existence of a permit system implies that permission may be granted, leaving the owner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. *Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.* (Emphasis supplied.)

In the situation at bar, a one-time finding of harassment bars the owner from ever receiving an alteration permit. The Resolution therefore does not imply that permission will be granted but rather mandates that permission be denied. Moreover, because of other statutory regulations concerning housing in New York City, the owner is not free to make other uses of his property. For instance, the owner cannot transform the property into commercial use. Similarly, the owner cannot raze the building and sell the vacant land. Instead, the owner must retain the residential use of the building, incur the attendant liability, but be forever foreclosed from improving same or even, as illustrated in this case, from repairing the essential services for the building.

Under these circumstances neither a reasonable use nor a reasonable return can be achieved.

We recognize, as did Chief Justice Rehnquist in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 149, n. 13 (1978) that:

> Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined.

In this case, the New York State courts declined to make such a critical inquiry. For this and the other significant reasons stated above, FBK's petition for a writ of certiorari should be granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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